

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MICHAEL and CATHERINE BURKE,

Plaintiffs,

v.

KATE WALSH, in her official capacity as Secretary of the
Massachusetts Executive Office of Health and Human
Services, et al.,

Defendants.

CIVIL ACTION
No. 3:23-cv-11798-MGM

DECLARATION OF KIMBERLY PARR

I, Kimberly Parr, hereby depose and state:

1. I am one of the Assistant Attorneys General assigned to represent the defendants in the above-captioned matter.

2. On November 2, 2023, I notified plaintiffs' counsel Lori Windham by email that defendants intended to focus their motion to dismiss on the individual-capacity claims and ask the Court to stay their obligation to answer the official-capacity claims until after that motion to dismiss was decided. My colleague and I later discussed this approach, and the possibility of early discovery on the official-capacity claims, with Attorney Windham and her colleague during a videoconference on November 14, 2023.

3. On December 1, 2023, I received an email from Attorney Windham expressing her view that "the official capacity defendants are currently in default." I communicated with Attorney Windham by email about this topic between December 1, 2023, and December 4, 2023. A copy of my email correspondence with Attorney Windham is attached hereto as **Exhibit A**.

4. As reflected in Exhibit A, at approximately 9:00PM on December 4, 2023, I informed Attorney Windham that defendants had prepared a motion to enlarge the defendants' time to respond to the official-capacity claims. I invited her to further confer on that motion, if she so desired. To date, I have not received a response to that email.

5. At approximately 10:20AM on December 5, 2023, I received service through the Court's ECF system that Attorney Windham had filed a request for default against the official-capacity defendants (ECF No. 66).

Signed on this 6th day of December, 2023, under the pains and penalties of perjury.

/s/ Kimberly Parr
Kimberly Parr (BBO No. 679806)
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that this document, filed through the Court's ECF system on December 4, 2023, will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Kimberly Parr
Kimberly Parr
Assistant Attorney General

EXHIBIT A

From: [Parr, Kimberly \(AGO\)](#)
To: [Lori Windham](#); [Tran, Liza \(AGO\)](#)
Cc: [Will Haun](#); [Benjamin Fleshman](#); [Spector, Amy \(AGO\)](#)
Subject: RE: Default application in Burke
Date: Monday, December 4, 2023 9:01:00 PM

Thank you, Lori. As I noted on Friday, while we do not believe there is any basis for plaintiffs to seek default judgment under these circumstances, we are amenable to bringing this matter to the court via motion practice, expanding on footnote 1 of our partial motion to dismiss. To that end, we have prepared a motion to enlarge the defendants' time to respond to the official-capacity claims to 14 days after the court's ruling on the partial motion to dismiss.

I believe this email correspondence satisfies our obligation to confer; please let me know if you think otherwise and we can arrange a time to speak, preferably in the morning.

Best,
Kim

Kim Parr, *she/her/hers*
Assistant Attorney General
Office of the Attorney General of Massachusetts
Direct: (617) 963-2489
Kimberly.Parr@mass.gov

From: Lori Windham <lwindham@becketlaw.org>
Sent: Monday, December 4, 2023 5:18 PM
To: Parr, Kimberly (AGO) <kimberly.parr@mass.gov>; Tran, Liza (AGO) <liza.tran@mass.gov>
Cc: Will Haun <whaun@becketlaw.org>; Benjamin Fleshman <bfleshman@becketlaw.org>; Spector, Amy (AGO) <amy.spector@mass.gov>
Subject: RE: Default application in Burke

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Kim,

Good evening. We believe that all defendants, in their official capacities, are in default. See, e.g., *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (“[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the [government] entity” and “not . . . against the official personally.”).

Best,
Lori

Lori Windham

Vice President and Senior Counsel

Becket – Religious Liberty for All

1919 Pennsylvania Ave NW Suite 400

Washington, DC 20006

202-349-7202

www.becketlaw.org

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From: Parr, Kimberly (AGO) <kimberly.parr@mass.gov>

Sent: Monday, December 4, 2023 4:47 PM

To: Lori Windham <lwindham@becketlaw.org>; Tran, Liza (AGO) <liza.tran@mass.gov>

Cc: Will Haun <whaun@becketlaw.org>; Benjamin Fleshman <bfleshman@becketlaw.org>; Spector, Amy (AGO) <amy.spector@mass.gov>

Subject: RE: Default application in Burke

Lori, good evening,

I just tried you by phone – before we tackle the discovery schedule, would you clarify who plaintiffs consider the “official capacity defendants”? I take from the cases cited that you believe the EOHHS Secretary and DCF Commissioner are in default. But I’d like to confirm whether you think any of the other defendants are, as well.

Thank you,

Kim

Kim Parr, *she/her/hers*

Assistant Attorney General

Office of the Attorney General of Massachusetts

Direct: (617) 963-2489

Kimberly.Parr@mass.gov

From: Lori Windham <lwindham@becketlaw.org>

Sent: Friday, December 1, 2023 3:45 PM

To: Parr, Kimberly (AGO) <kimberly.parr@mass.gov>; Tran, Liza (AGO) <liza.tran@mass.gov>

Cc: Will Haun <whaun@becketlaw.org>; Benjamin Fleshman <bfleshman@becketlaw.org>; Spector, Amy (AGO) <amy.spector@mass.gov>

Subject: RE: Default application in Burke

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Exh. A_002

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Kim,

Thanks for your quick response. While we are hopeful that we can work collaboratively, we were disappointed that during our prior call to discuss moving forward, we were met with nothing more than demands for specific details regarding our discovery requests—far more than are generally available to parties working out schedules at a case management conference—and a failure to explain how we could move forward with discovery in the absence of an answer notifying us of your clients’ defenses. It has been four months since the service of the complaint, and the official capacity defendants’ failure to answer or otherwise defend is in clear violation of the federal rules.

I have proposed a schedule for official capacity discovery below:

Dec. 4: File answer, opening of fact discovery

Dec 20: Initial disclosures

Jan-Feb: Fact depositions

Feb 15: Expert disclosures

March 1: Fact discovery complete

March 15: Expert discovery complete

April 1: Motions for summary judgment on official capacity claims

April 22: MSJ responses

May 6: MSJ replies

September 15: Pretrial conference

October 2024: Trial

I’ll look forward to your response.

Best,

Lori

Lori Windham

Vice President and Senior Counsel

Becket – Religious Liberty for All

1919 Pennsylvania Ave NW Suite 400

Washington, DC 20006

202-349-7202

www.becketlaw.org

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From: Parr, Kimberly (AGO) <kimberly.parr@mass.gov>
Sent: Friday, December 1, 2023 2:18 PM
To: Lori Windham <lwindham@becketlaw.org>; Tran, Liza (AGO) <liza.tran@mass.gov>
Cc: Will Haun <whaun@becketlaw.org>; Benjamin Fleshman <bfleshman@becketlaw.org>; Spector, Amy (AGO) <amy.spector@mass.gov>
Subject: RE: Default application in Burke

Adding our colleague, Amy Spector.

Lori,

Thank you for reaching out. I am surprised by this turn of events, given our seemingly collaborative and cooperative conversations about the official v. individual capacity claims and the possibility of moving the case forward with discovery, even before the required case management conference. On that latter point, we have been waiting for the discovery proposal you promised during our last call – is that still coming or no?

In any event, we do not see any basis for plaintiffs to pursue entry of a default judgment against the official capacity defendants on the facts presented here (*i.e.*, where the AGO has entered appearances on behalf of all defendants, stated its position with respect to the official capacity defendants' obligation to answer to the court, and engaged in discussions with you about those same defendants). *See, e.g., Dimanche v. Massachusetts Bay Transp. Auth.*, 893 F.3d 1, 10 (1st Cir. 2018) (cautioning that "entry of default judgment is a drastic measure that should only be employed in extreme situations") (cleaned up); *Ortiz-Gonzalez v. Fonovisa*, 277 F.3d 59, 63 (1st Cir. 2002) (default judgments intended to protect diligent parties whose adversaries are clearly unresponsive). If your goal is to challenge our view of the law regarding the official capacity defendants' obligation to answer before the motion to dismiss is decided, we can and should work together to tee that up for the court in a less dramatic fashion – likely through an opposed motion for enlargement of time to respond.

If you are amenable to this, let me know and we can work out a time frame for filing that motion. Of course, should you proceed with an application for default judgment, we will oppose it and decline further discussions about discovery unless and until required by the court.

Thank you,
Kim

Kim Parr, *she/her/hers*
Assistant Attorney General
Office of the Attorney General of Massachusetts
Direct: (617) 963-2489
Kimberly.Parr@mass.gov

From: Lori Windham <lwindham@becketlaw.org>

Sent: Friday, December 1, 2023 12:42 PM

To: Parr, Kimberly (AGO) <kimberly.parr@mass.gov>; Tran, Liza (AGO) <liza.tran@mass.gov>

Cc: Will Haun <whaun@becketlaw.org>; Benjamin Fleshman <bfleshman@becketlaw.org>

Subject: Default application in Burke

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Kim and Liza,

While preparing our opposition, we also looked at your footnote regarding the decision not to file an answer for the remaining defendants. We reviewed the caselaw and believe the official capacity defendants are currently in default. A motion to dismiss filed “by one defendant does not entitle another defendant to an automatic extension of the time in which to answer under Rule 12” and does not “relieve the [other defendants] from their obligation to file an answer”—even if all defendants are represented by the same counsel. *Hanley v. Volpe*, 48 F.R.D. 387, 388 (E.D. Wis. 1970); accord 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1346 (3d ed. as updated Apr. 2023) (“[T]he filing of a Rule 12(b) motion by one defendant does not automatically extend the period within which a codefendant may answer.”).

You cited one case to the contrary, but even there, “the defendants [were] cautioned that, in the future, failing to file an appropriate motion for extension of time and ignoring deadlines will not be considered favorably.” *Alston v. Sharpe*, No. 3:13-CV-0001 CSH, 2015 WL 4715340, at *2 (D. Conn. Aug. 7, 2015). The weight of authority is that defendants who fail to answer when a codefendant moves for dismissal are in default. See, e.g., *Posey v. Pruger*, 2015 WL 5610764, at *4 (N.D. Ill. Sep. 22, 2015); *Davis v. Supreme Lab. Source, LLC*, No. EP-23-CV-00046-KC, 2023 WL 6612902, at *3 n.9 (W.D. Tex. Oct. 10, 2023); *Snyder v. Jefferson Cnty. Sheriff’s Dep’t*, 2022 WL 2818469, at *1 (D. Neb. July 19, 2022); *Floors-N-More, Inc. v. Freight Liquidators*, 142 F. Supp. 2d 496, 502-03 (S.D.N.Y. 2001); *Austin v. Onward, LLC*, 2015 WL 12940029, at *2 n.1 (S.D. Tex. Apr. 2, 2015).

Accordingly, we plan to apply for a default judgment against the official capacity defendants on Tuesday, if no answer has been filed.

Best,
Lori

Lori Windham
Vice President and Senior Counsel
Becket – Religious Liberty for All
1919 Pennsylvania Ave NW Suite 400
Washington, DC 20006
202-349-7202
www.becketlaw.org

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